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Ng Kwok Seng & Anor v Mei Ling Ng (f)

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
24NCVC-633-03 OF 2013
LEE HENG CHEONG JC
10 FEBRUARY 2014

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Equity — Estoppel — Res judicata — Applicability of principle of ademption — Matter earlier decided and resolved by Singapore High Court — New proceeding clearly part of the subject matter of earlier litigation — Whether present claim estopped by res judicata/issue estoppel

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Succession — Will — Bequest — Testator leaving estate to daughter and two sons — Whether monies held in joint accounts of testator and daughter belonged to daughter solely — Whether monies in joint accounts gifted to daughter inter vivos — Whether monies in joint accounts to be considered an ademption by satisfaction of part of the daughter's entitlement under the will — Whether presumption against double portions applied — Whether principle of ademption applicable — Whether presumption rebutted by express intention of the testator — Whether matter earlier decided and resolved by Singapore High Court — Whether present claim estopped by res judicata/issue estoppel

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Mr Ng Cheong Choy ('the deceased') executed a will on 15 March 2007 in which he left his entire estate to his three children. The deceased gave half of his estate to his daughter, the defendant herein with the other half to be divided equally between his two surviving sons, the plaintiffs herein. The deceased passed away on the 29 March 2007. After the deceased's death, the defendant contended that all the monies held joint accounts in both Kuala Lumpur and Singapore, belonged to her solely as they had been 'gifted' to her inter vivos by the deceased shortly before he died, on the 14 March 2007 and one day before the deceased signed his will. On 8 April 2008, the plaintiffs filed a suit in the Singapore High Court seeking a declaration that the monies held in the said an HSBC account formed part of the deceased's estate. The Singapore High Court found that the monies in the said account was gifted by the deceased to the defendant and dismissed the suit. Four years later the plaintiffs filed the present suit seeking a declaration that all monies held in the joint names of the defendant and the deceased be considered an ademption by satisfaction of part of the defendant's entitlement to the division of deceased's estate in accordance with the deceased's will, by virtue of the common law 'presumption against double portions'. The plaintiff contended that the presumption against double portions applied. The defendant contended that the presumption against

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double portions did not apply to this case and if the presumption against double portions applied to this case, the said presumption had been rebutted by the express intention of the deceased. The defendant further contended that the present suit was an abuse of the court's process and that the plaintiffs were estopped by the principles of *res judicata*/issue estoppel from raising this fresh issue of ademption by virtue of presumption of double portions.

Held, dismissing the plaintiff's application with costs RM15,000:

- (1) In the circumstances of this case, the principle of ademption by virtue of presumption against double portions was inapplicable as the monies in the HSBC account was gifted to the defendant on 13 March 2007, ie prior to the deceased's will (see para 20).
- (2) Even if the presumption against double portions was applicable to this case, it could be rebutted with evidence that the testator did in fact intend to give double portions to the donee. The deceased did address his mind specifically to this issue in dispute and intended the defendant to benefit from the inter vivos gift and his legacy under his will. The deceased, at the time of executing his said will, was perfectly aware that he was giving the defendant, double portions. The deceased could have reduced the defendant's double entitlement under the said will, but intentionally chose not to do so. Thus, the presumption against double portions, if applicable to this case, had been successfully rebutted by the evidence that the deceased did in fact intend to give double portions to the defendant (see paras 21, 24–25).
- (3) A party is estopped from raising in a subsequent proceeding the causes of action or issues or facts, which are so clearly part of the subject matter of the earlier litigation, and so clearly could and should have been raised in the earlier proceeding. It is an abuse of the process of the court when a new proceeding is commenced on the causes of action or issues or facts which were so clearly part of the subject matter of the earlier litigation (see para 28(a)).
- (4) The plaintiffs could have and should have raised the issue of ademption in the Singapore suit as it formed part of the same subject matter of the litigation and was located within the jurisdiction of Singapore. Since the plaintiffs had already put forward a similar argument before the Singapore court and the same was rejected, the court should not permit the abuse of the court's process by the plaintiffs. The Singapore High Court had made clear findings of fact and law after a full trial and found that the monies in the said HSBC account were gifted by the deceased to defendant, in addition to her legacy under the said Will (see paras 28(e)(f) & (g)).

A [Bahasa Malaysia summary]

- Encik Ng Cheong Choy ('si mati') telah melaksanakan wasiat pada 15 Mac 2007 yang mana dia meninggalkan kesemua harta pusaka kepada ketiga-tiga anaknya. Si mati telah memberikan separuh daripada harta pusakanya kepada anak perempuannya, defendan di sini dan separuh lagi dibahagikan sama rata di antara dua anak lelakinya, plaintif-plaintif di sini. Si mati telah meninggal dunia pada 29 Mac 2007. Selepas kematian si mati, defendan berhujah bahawa semua wang yang dipegang dalam akaun bersama di Kuala Lumpur dan Singapura, adalah miliknya kerana ia telah 'gifted' kepadanya *inter vivos* oleh si mati sejurus sebelum dia meninggal dunia, pada 14 Mac 2007 dan satu hari sebelum si mati menandatangani wasiatnya. Pada 8 April 2008, plaintif telah memfailkan guaman di Mahkamah Tinggi Singapura memohon deklarasi agar wang yang dipegang dalam akaun HSBC tersebut membentuk sebahagian daripada harta pusaka si mati. Mahkamah Tinggi Singapura mendapati wang dalam akaun tersebut telah dihadiahkan oleh si mati kepada defendan dan menolak guaman itu. Empat tahun kemudian plaintif-plaintif telah memfailkan guaman ini memohon deklarasi agar semua wang yang dipegang dalam nama-nama bersama defendan dan si mati dianggap adempsi dengan penyelesaian sebahagian daripada hak defendan kepada pembahagian harta pusaka si mati menurut wasiat si mati, berdasarkan *common law* 'presumption against double portions'. Plaintif berhujah bahawa andaian terhadap bahagian dua kali ganda adalah terpakai. Defendan berhujah bahawa andaian terhadap bahagian dua kali ganda tidak terpakai kepada kes ini dan jika andaian terhadap bahagian dua kali ganda terpakai dalam kes ini, andaian tersebut telah pun dipatahkan oleh niat nyata si mati. Defendan selanjutnya berhujah bahawa guaman ini adalah penyalahgunaan proses mahkamah dan bahawa plaintif-plaintif diestopkan oleh prinsip *res judicata*/isu estoppel daripada menimbulkan isu baru adempsi menurut andaian bahagian dua kali ganda.
- G Diputuskan,** menolak permohonan plaintif dengan kos sebanyak RM15,000:
- (1) Dalam keadaan kes ini, prinsip adempsi menurut andaian terhadap bahagian dua kali ganda tidak terpakai kerana wang dalam akaun HSBC telah dihadiahkan kepada defendan pada 13 Mac 2007, iaitu sebelum wasiat si mati (lihat perenggan 20).
 - (2) Jika pun andaian terhadap bahagian dua kali ganda terpakai dalam kes ini, ia boleh dipatahkan dengan keterangan yang pewasiat sememangnya berniat untuk memberikan bahagian dua kali ganda kepada penerima. Si mati mengarahkan mindanya khusus kepada isu yang dipertikaikan dan berniat agar defendan mendapat faedah daripada hadiah *inter vivos* dan legasinya di bawah wasiatnya. Si mati, pada masa melaksanakan wasiatnya, menyedari bahawa dia telah memberikan defendan bahagian dua kali ganda. Si mati boleh mengurangkan kelayakan berganda defendan di bawah wasiat tersebut, tetapi sengaja memilih untuk tidak

berbuat demikian. Oleh itu, andaian terhadap bahagian dua kali ganda, jika terpakai dalam kes ini, hendaklah berjaya dipatahkan dengan keterangan bahawa si mati sememangnya berniat untuk memberikan bahagian dua kali ganda kepada defendan (lihat perenggan 21, 24–25).

- (3) Pihak diestop daripada menimbulkan prosiding seterusnya kausa tindakan atau isu-isu atau fakta, yang jelas sebahagian daripada hal perkara litigasi sebelumnya, dan jelas boleh dan patut ditimbulkan dalam prosiding sebelumnya. Ia adalah penyalahgunaan proses mahkamah apabila prosiding dimulakan atas kausa tindakan atau isu atau fakta yang jelas sebahagian daripada hal perkara litigasi sebelumnya (lihat perenggan 28(a)).

- (4) Plaintiff boleh dan patut menimbulkan isu adempsi dalam guaman Singapura kerana ia membentuk sebahagian daripada hal perkara sama litigasi dan terletak dalam bidang kuasa Singapura. Oleh sebab plaintiff-plaintiff telah pun mengemukakan hujah sama di hadapan mahkamah Singapura dan yang sama telah ditolak, mahkamah tidak patut membenarkan proses mahkamah oleh plaintiff-plaintiff. Mahkamah Tinggi Singapura telah membuat penemuan fakta dan undang-undang yang jelas selepas perbicaraan penuh dan mendapati bahawa wang dalam akaun HSBC tersebut diberi hadiah oleh si mati kepada defendan, selain daripada legasinya di bawah wasiat tersebut (lihat perenggan 28(e)(f) & (g)).]]]

Notes

For cases on bequest, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2681–2688.

For cases on res judicata, see 6 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2936–2937.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 ; [1995] 3 CLJ 783, SC (refd)

Kloosman (Executor of the will of the above named deceased) v Aylen and others [2013] EWHC 435, Ch D (refd)

OCBC Bank (Malaysia) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544 ; [1997] 2 CLJ 534, CA (refd)

Showlag v Mansour and others [1994] 2 All ER 129, PC (refd)

Vaux, Nicholson v Vaux (No 2), Re [1938] 4 All ER 703, CA (refd)

Americk Singh Sidhu (Americk Sidhu) for the plaintiffs.

Goh Siu Lin (Bong Ying Wei with him) (Shook Lin & Bok) for the defendant.

A Lee Heng Cheong JC:**INTRODUCTION**

[1] In this action the plaintiffs claimed for the following:

- B** (i) A declaration that all monies held in the Hong Kong and Shanghai Banking Corporation Limited Private Bank (Suisse) ['HSBC'], Singapore Account No 8212-331217-0001, in the joint names of the Defendant and the late Ng Cheong Choy ('Deceased') be considered an ademption by satisfaction of part of the Defendant's entitlement to the division of Deceased's Estate in accordance with the
- C** Deceased's Will dated 15/3/2007, by virtue of the common law 'presumption against Double Portions'.

[2] The following cause papers are referred to:

D	DATE	DESCRIPTION	ENCLOSURE NO
	27 March 2013	Plaintiffs' originating summons	
E	27 March 2013	Plaintiffs' affidavit affirmed by Ng Kwok Seng dated ('the plaintiffs' first affidavit');	
	21 June 2013	Defendant's affidavit in reply (1) affirmed by Mei Ling Ng ('the defendant's first affidavit');	
F	4 July 2013	Plaintiffs' affidavit in reply (2) affirmed by Ng Kwok Seng ('the plaintiffs' second affidavit');	
G	18 July 2013	Defendant's affidavit in reply (2) affirmed by Mei Ling Ng ('the defendant's second affidavit').	
	25 July 2013	Plaintiffs' affidavit in reply (3) affirmed by Ng Kwok Seng ('the plaintiffs' third affidavit')	

H BACKGROUND FACTS

- [3]** Mr Ng Cheong Choy ('the deceased') was a banker by profession who has four offspring, three of whom currently survive him. They are the parties to this originating summons. The deceased's wife passed away in 1989 and the deceased's eldest son, Edwin, passed away in 2007. The deceased made his first will in 1982 on 10 February 1982. In this will, the deceased left his estate to his wife and four children in the manner set out therein (exh WN2 AIS).
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[4] After the deceased's wife passed away in 1989, the deceased prepared another will superseding the will prepared in 1982. In this 1989 will, the deceased left his entire estate to his four children in equal shares. (exh WN3 AIS). A

[5] The deceased's eldest son Edwin, passed away in March 2007 and the deceased then execute another will, on the 15 March 2007, in which he left his entire estate to his three remaining children, except this time, the deceased gave half of his estate to his daughter, the defendant herein with the other half to be divided equally between his two surviving sons, Wilfred and Roy. A copy of the last will and testament of the deceased is displayed at (exh WN1 AIS). B C

[6] On 12 March 2007, three days prior to the said will, the deceased instructed HSBC Private Bank (Suisse) to transfer the monies in HSBC Account No 8212-331280-0001 to the HSBC Account No 8212-331272-0001. D

[7] The deceased's last will and testament was signed by the deceased on the 15 March 2007 and the deceased passed away on the 29 March 2007, exactly two weeks later. E

[8] After the deceased's death, the defendant contended that all the monies held in four joint accounts in both Kuala Lumpur and Singapore, belonged to her solely as they had been 'gifted' to her inter vivos by the deceased shortly before he died, on the 14 March 2007 and one day before the deceased signed his last will and testament. F

[9] The following relevant four bank accounts are as follows:

- (a) HSBC Singapore A/C No 8212-331217-001;
- (b) Public Bank KL A/C No 3-106-58943-6;
- (c) HSBC KL A/C No 203-283833; and
- (d) Hong Leong Bank Singapore A/C No 90-00-05244-4. G

[10] On 4 April 2008, the plaintiffs filed a suit in the Kuala Lumpur High Court vide Civil suit No S6-22-411 of 2008 ('the KL suit'), seeking, inter alia, a declaration that the monies held in the Malaysian joint accounts in the names of the deceased and the defendant (ie the Public Bank Account and the HSBC Bank Account), formed part of the deceased's estate. The KL suit was settled and a consent order dated 10 January 2012 was recorded. H I

[11] On 8 April 2008, the plaintiffs filed a second suit in the Singapore High Court vide the Civil suit No 249 of 2008 ('the Singapore suit'), seeking a

A declaration that the monies held in the said HSBC Account No 8212–331272–0001 formed part of the deceased’s estate.

B [12] On 29 September 2009, the Singapore High Court judge, in delivering the judgment and found that the monies in the said HSBC Account No 8212–331272–0001 was gifted by the deceased to the defendant and dismissed the Singapore suit. The plaintiffs’ appeal to the Singapore Court of Appeal was also dismissed.

C [13] Four years later, on 27 March 2013, the plaintiffs filed this application herein.

THE PLAINTIFF’S CASE

D [14] The plaintiff contends in essence as follows:

- E (a) that the presumption against double portions applies. Equity presumes that an inter vivos gift of a portion of a deceased’s estate, to any one or more of the beneficiaries, is considered an advancement and has to be brought into account upon the distribution of that deceased’s estate amongst all beneficiaries; and
- F (b) that res judicata/issue estoppel is not applicable as the issue before the Singapore High Court was simply for a declaration that the monies held by the defendant herein belonged to the estate of the deceased. Inconsequential ancillary orders were prayed for. The Singapore court held the monies belonged to the defendant herein Mei Ling as the deceased had given these to her. The issue before this court, based on the findings of the Singapore High Court, is whether the defendant herein is obliged to account for those monies gifted to her inter vivos when sharing the assets of the estate with the plaintiffs, her brothers and
- G beneficiaries under the deceased’s will.

THE DEFENDANT’S CASE

H [15] The defendant contends in essence as follows:

- I (a) that the presumption against double portions does not apply to this case and if the presumption against double portions applies to this case, the said presumption been rebutted by the express intention of the deceased; and
- (b) that this application by the plaintiffs is an abuse of the court’s process; that the plaintiffs are estopped by the principles of res judicata/issue estoppel from raising this fresh issue of ademption by virtue of presumption of double portions.

CONSIDERATION OF THE CONTENTIONS RAISED

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[16] The plaintiff contends that the presumption against double portions applies and equity presumes that an inter vivos gift of a portion of a deceased's estate, to any one or more of the beneficiaries, is considered an advancement and has to be brought into account upon the distribution of that deceased's estate amongst all beneficiaries.

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WHETHER THE PRESUMPTION AGAINST DOUBLE PORTIONS APPLIES TO THIS CASE?

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[17] In *Halsbury's Laws of England*, (4th Ed 2005) Reissue, Vol 50 at para 445 states as follows:

Methods of ademption

A testamentary gift may be adeemed or taken away from the donee:

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- (1) by a subsequent disposition by the testator of the subject matter of the gift;
- (2) by a change in the ownership or nature of the property; and
- (3) *by the presumption that the testator does not intend to provide double portions for his children or other persons to whom he stands in loco parentis.*

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(Emphasis added.)

[18] In *Probate and The Administration of Estates: A Practical Guide*, (2nd Ed, 1996) which referred to *Jarman on Wills* (7th Ed, 1930) Vol II, at p 211 and states as follows:

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The doctrine, then, which is fully established although some modern judges dislike it, depends upon two assumptions:- (1) *that a legacy to a child is intended to be a portion; (2) that a subsequent portion is intended to be in substitution for the legacy* (Emphasis added.)

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[19] In *Re Vaux, Nicholson v Vaux (No 2)* [1938] 4 All ER 703, Lord Greene MR explained the presumption of ademption of a legacy by a portion as follows:

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The conception is that the testator having in his will given to his children that portion of the estate which he decides to give to them, when *after* making his will he confers upon a child a gift of such a nature as to amount to a portion, then he is not to be presumed to have intended that that child should have both, the gift inter vivos being taken as being on account of the portion given by the will. (Emphasis added.)

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[20] Thus in the circumstances of this case, this court finds that the principle of ademption by virtue of presumption against double portions is inapplicable

A in this case as the monies in the said HSBC Account No 8212–331272–0001 was gifted to defendant on 13 March 2007, ie prior to the deceased’s said will dated 15 March 2007 and not after.

B IN THE EVENT THE PRESUMPTION AGAINST DOUBLE PORTIONS APPLIES TO THIS CASE, WHETHER THE SAID PRESUMPTION HAS BEEN REBUTTED?

C [21] This court finds that even if the presumption against double portions is applicable to this case, it can be rebutted with evidence that the testator did in fact intend to give double portions to the donee.

D [22] In *Kloosman (Executor of the will of the above named deceased) v Aylen and others* [2013] EWHC 435 (Ch D), the court states, inter alia, as follows:
[77] ... Where both the bequest in the will and the inter vivos gift are portions, the presumption will arise but *can be rebutted if there is evidence that the testator did in fact intend to give two portions to the donee.* (Emphasis added.)

E [23] In the textbook, *Probate and The Administration of Estates: A Practical Guide*, (2nd Ed, 1996) which referred to *Jarman on Wills* (7th Ed, 1930) Vol II, at p 211, which states as follows:

F The doctrine, then, which is fully established although some modern judges dislike it, depends upon two assumptions: (1) *that a legacy to a child is intended to be a portion*; (2) *that a subsequent portion is intended to be in substitution for the legacy*. It is not very easy to ascertain the precise import of the first of these propositions, for the word portion is not a term of art. But it seems to be something which is *given by the parent to establish a child in life or to make what is called provision for him*. The second proposition is merely a special case of the general rule of equity which presumes that a testator does not intend child to have a double portion. *This presumption is not a rule of law and may be rebutted.* (Emphasis added.)

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H [24] This court finds that the deceased did address his mind specifically to this issue in dispute and intended the defendant to benefit from the inter vivos gift and his legacy under his will. This is substantiated and evidenced by the followings:

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- (a) the letter dated 28 July 2008 from Dato’ Dominic J Puthucheary of Messrs Puthucheary, Firoz & Mai (see the said letter annexed to the defendant’s first affidavit, exh ‘MLN3’, at p 20;
 - (b) the fact that the monies from the said HSBC Account No 8212–331280–0001 were transferred to the said HSBC Account No 8212–331272–0001 prior to the deceased’s execution of the said will dated 15 March 2007;

- (c) furthermore, this court noted that when the defendant asked the deceased what he wanted to do with the monies in the said HSBC Account No 8212-331272-0001, the deceased replied 'Mei Ling, it's up to you.' (see the letter at the defendant's first affidavit, exh 'MLN2', at p 19); A
- (d) in the judgment of the Singapore Court in the Singapore suit, in particular pp 31-32 and 34 of the defendant's first affidavit, exh 'MLN4'. At pp 31-32, paras 23-25 states as follows: B

23 However this submission did not take into account the mindset and emotions at the material time, which was the period between Edwin's death and his own. Here was a man whose eldest son had just died and driven to contemplating his own mortality. Mr Ng's two sons were successful in their careers and their lives but he was severely disappointed at how they treated him. His daughter, who was single and lived with him, was not as capable as her brothers. He was fully aware that she would be quite alone in this world after his demise. It is in this context that I must consider whether it was so incredible that Mr Ng could, at that time, have acted in the manner that Meiling and Puthuchearry had testified that he did. I certainly thought that it was entirely possible. C

24 Indeed on the evidence before me, I found that in the remaining weeks of his life, Mr Ng had a change of mind regarding the distribution of his estate. Certainly with respect to what Mr Ng had provided in the Will, there is ample evidence that he had a change of mind. In the two previous wills, the 1982 Will and 1989 Will, he had provided his four children with equal shares. Throughout the last decade of his life, the notes he left behind showed that they were to receive equal shares of his properties, except with provisions to ensure that Edwin would be taken care of. But when Edwin died, Mr Ng was severely affected. And when it came to putting down his intentions in his last will and testament, he had clearly provided that Meiling would get a half share whereas the plaintiffs would only get a quarter each. This puts paid to the plaintiffs' contention that Mr Ng's past manifestations of intent in relation to distribution of his assets showed that he could not have intended to give Meiling more. D

25 There was a rather poignant event that I felt compelled to note. The plaintiffs and Puthuchearry emphasised that at the 8 (or 9) March 2007 meeting, Mr Ng had declared to all present, namely Meiling, Roy, Puthuchearry and Cheng that in his new will he would give each of his three children an equal share of his estate. After that he had a tēcircumflex;te-à-tēcircumflex;te with Puthuchearry in which he poured out his sorrows regarding his children and then told the lawyer that he wanted to make further instructions regarding his will, without specifying what these were. Less than a week later, on 14 March 2007, Mr Ng instructed Puthuchearry on the 50:25:25 distribution after again ventilating his sorrows to his confidant. Puthuchearry said that Mr Ng complained about his sons, but not Meiling. Mr Ng told Puthuchearry that he was very disappointed in Roy and Wilfred, that they only called him about money and never inquired after his health. He told Puthuchearry about the humiliation he had suffered from them and their wives ... E

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A (Emphasis added.)
At p 34, para 27:

B 27 ...*This evidence was corroborated by the evidence of Puthuchearry who said that Mr Ng had told him at the time he gave instructions on the Will that he was giving the moneys in the HSBC Account and other joint accounts with Meiling to her. The plaintiffs were in the difficult position of proving a negative ...* In my view, the combined evidence of Meiling and Puthuchearry proved on a balance of probability that Mr Ng had given to Meiling the moneys in the HSBC Account and I so find.

C (Emphasis added.)

D [25] Thus this court finds that the above showed that the deceased, at the time of executing his said will, was perfectly aware that he was giving the defendant, double portions. The deceased could have reduced the defendant's double entitlement under the said will, but intentionally chose not to do so. Thus this court finds that the presumption against double portions, if applicable to this case, has been successfully rebutted by the above evidence that the deceased did in fact intend to give double portions to the defendant.

E WHETHER RES JUDICATA/ISSUE ESTOPPEL APPLIES

F [26] The plaintiff contends that res judicata/issue estoppel is not applicable herein as the issue before the Singapore High Court in the Singapore suit, was simply for a declaration that the monies held by the defendant herein belonged to the estate of the deceased. The Singapore court held the monies belonged to the defendant herein, as the deceased had given these to her whilst the issue before this court, based on the findings of the said Singapore High Court, is whether the defendant herein is obliged to account for those monies gifted to her inter vivos when sharing the assets of the estate with the plaintiffs, her brothers and beneficiaries under the deceased's said will.

H [27] The defendant contends that this application by the plaintiffs is an abuse of the court's process and that the plaintiffs are estopped by the principles of res judicata/issue estoppel from raising this fresh issue of 'ademption by virtue of presumption of double portions.

[28] This court finds as follows:

I (a) It is trite that a party is estopped from raising in a subsequent proceeding the causes of action or issues or facts, which are so clearly part of the subject matter of the earlier litigation, and so clearly could and should have been raised in the earlier proceeding. It is an abuse of the process of

the court when a new proceeding is commenced on the causes of action or issues or facts which are so clearly part of the subject matter of the earlier litigation;

- (b) in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, the Supreme Court, inter alia, held at p 198 (MLJ); p 784 (CLJ) as follows:

[1] The significance of res judicata lies in its effect of creating an estoppel per rem judicatum, which may take the form of either *cause of action estoppel* or *issue estoppel*. The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, that is the cause of action, merges into the said final judgment. The issue estoppel, on the other hand, means simply an issue which a party is estopped from raising in a subsequent proceeding.

[2] The doctrine of res judicata is not confined to causes of action or issues which the court is actually asked to decide or has already decided. *It covers also causes of action or issues or facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.* (Emphasis added.).

- (c) in *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; [1997] 2 CLJ 534, the Court of Appeal held, inter alia, as follows:

The plea of res judicata encompasses two distinct forms of estoppel, ie, 'cause of action estoppel' and 'issue estoppel' ...

'Issue estoppel' represents an extension of the doctrine of res judicata to include *a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also 'to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*

Thus 'issue estoppel' has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier. (Emphasis added.).

- (d) in the Privy Council case of *Showlag v Mansour and others* [1994] 2 All ER 129, the court, inter alia, held:

At p 133, the Court held:

In *Owens Bank Ltd v Bracco* [1992] 2 All ER 193 at p 198, [1992] 2 AC 443 at 484 Lord Bridge of Harwich said:

A foreign judgment given by a court of competent jurisdiction over the

- A defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the *defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court.* (Emphasis added.),
- B At p 136, the court held:
- ... on ordinary principles a party *is not entitled to raise in a later proceeding a point which was open to him in an earlier one but which he did not take.* (Emphasis added.),
- C (e) this court finds that the plaintiffs could have and should have raised the issue of ademption in the Singapore suit as it formed part of the same subject matter of the litigation and is located within the jurisdiction of Singapore. Further it would be an abuse of the process of this court to
- D allow the plaintiffs to file these proceedings on a piece-meal instalment basis;
- (f) since the plaintiffs had already put forward a similar argument before the Singapore court and the same was rejected. This court thus shall not permit the abuse of the court's process by the plaintiffs;
- E (g) this court finds that the Singapore High Court had made clear findings of fact and law after a full trial and found that the monies in the said HSBC Account No 8212–331272–0001 were gifted by the deceased to defendant, in addition to her legacy under the said will. See the
- F Singapore judgment at pp 30–33 of the defendant's first affidavit, exh 'MLN4'. At p 30, para 22 states as follows:
- ... the Plaintiffs contended, it could not have been possible that Mr. Ng, having given Meiling twice much as each of the other two sons, would gift to her practically half of his assets and after this, further give her the remainder.
- G At p 33, para 27 states as follows:
- ... Did he or did he not decide, in addition to giving Meiling half of his estate under the Will, to give to her while he was still alive, the moneys in the joint account? In this regards, Meiling's evidence was that Mr Ng had told her that 'it is up to you' when she asked him about the money in the HSBC account. This evidence was corroborated by the evidence of Puthuchearu who said that Mr Ng had told him at the time he gave instructions on the Will that he was giving the moneys in HSBC Account and other joint accounts with Meiling to her. The Plaintiffs were in the difficult position of proving a negative ...
- I *In my view, the combined evidence of Meiling and Puthuchearu proved on a balance of probability that Mr Ng had given to Meiling the moneys in the HSBC Account and I so find.* (Emphasis added.),
- (h) in the light of this court's above findings, this court thus accepts and adopts the findings of the Singapore court as stated above.

ORDER

[29] In the light of the above findings, this court finds that there are no merits in the plaintiffs' application. In the premises this court dismisses the plaintiff's application herein with costs of RM15,000.

Plaintiff's application dismissed with costs of RM15,000.

Reported by Kanesh Sundrum

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